

**UNITED STATES – MEASURES AFFECTING TRADE  
IN LARGE CIVIL AIRCRAFT  
(SECOND COMPLAINT)**

Recourse to Article 21.5 of the DSU by the European Union

*Request for Consultations*

The following communication, dated 25 September 2012, from the delegation of the European Union to the delegation of the United States and to the Chairperson of the Dispute Settlement Body, is circulated in accordance with Article 21.5 of the DSU.

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With respect to dispute WT/DS353, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint) (US – Large Civil Aircraft)*, the European Union hereby requests consultations with the United States (US) pursuant to Articles 4 and 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)*, Article XXIII:1 of the *General Agreement on Tariffs and Trade 1994 (GATT 1994)*, Articles 4.1, 7.1 and 30 of the *Agreement on Subsidies and Countervailing Measures (SCM Agreement)*, to the extent that Article 30 incorporates Article XXIII of the *GATT 1994*, and the "Agreed Procedures under Articles 21 and 22 of the *Dispute Settlement Understanding* and Article 7 of the *SCM Agreement*" concluded by the European Union and the United States with respect to this dispute on 12 January 2012 (Sequencing Agreement).<sup>1</sup>

**I. BACKGROUND**

For decades, the United States has provided subsidies for the development and production of large civil aircraft. While there is disagreement on the precise amount of total subsidization, there is no dispute that it runs to many billions of dollars.

On 23 March 2012, the Dispute Settlement Body (DSB) adopted the Appellate Body Report and the Panel Report (as modified) in *US – Large Civil Aircraft*, which found that US federal, state and local governments provide subsidies to US producers of large civil aircraft (LCA) – specifically, the Boeing Company (Boeing) – that are inconsistent with US obligations under the *SCM Agreement*.

In particular, the DSB ruled that the following are specific subsidies, within the meaning of Articles 1 and 2 of the *SCM Agreement*, that cause adverse effects, or threat thereof, to European Union (EU) interests, within the meaning of Articles 5(c) and 6.3(b) and (c) of that same *Agreement*:

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<sup>1</sup> WT/DS353/14, 27 April 2012, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, Understanding between the European Union and the United States Regarding Procedures under Articles 21 and 22 of the *DSU*, concluded 12 January 2012.

- Payments and access to government facilities, equipment, and employees under National Aeronautics and Space Administration (NASA) aeronautics research & development (R&D) programs;
- Payment and access to facilities under US Department of Defense (DoD) aeronautics R&D programs;
- Tax exemptions under Foreign Sales Corporation/Extraterritorial Income (FSC/ETI) legislation and successor acts;
- Washington State business and occupation (B&O) tax rate reductions; and,
- Tax exemptions related to Industrial Revenue Bonds (IRBs) issued by the City of Wichita, Kansas.

The DSB recommended that the United States take appropriate steps to remove the adverse effects or withdraw the subsidies.<sup>2</sup> Under Article 7.9 of the *SCM Agreement*, the United States had until 24 September 2012 to comply with the DSB's recommendations.

The DSB also ruled that the United States provides subsidies to Boeing that are prohibited by the *SCM Agreement*, and recalled that prior recommendations of the DSB with respect to this matter continue to be operative.<sup>3</sup>

By communication dated 23 September 2012, the United States notified the European Union that the United States has taken a number of actions allegedly withdrawing the subsidies or removing their adverse effects (23 September 2012 notification).

## II. SUMMARY

The actions and events listed by the United States in its 23 September 2012 notification do not withdraw the subsidies or remove their adverse effects, as required by Articles 4.7 and 7.8 of the *SCM Agreement*. Instead, after the end of the implementation period on 24 September 2012, the United States maintains specific subsidies that cause present adverse effects to EU interests. These subsidies are also prohibited subsidies, as they are contingent on export performance, as well as on the use of domestic over imported goods. Accordingly, in the view of the European Union, the United States has failed to achieve compliance with the recommendations and rulings of the DSB. The European Union therefore requests consultations with the United States concerning, *inter alia*, the matters described below.

## III. MEASURES

After the end of the implementation period on 24 September 2012, the United States maintains billions of dollars of subsidies, within the meaning of Article 1.1 of the *SCM Agreement*, including both those subsidies that the DSB ruled to be specific subsidies causing adverse effects, as well as additional subsidies that constitute "measures taken to comply", within the meaning of Article 21.5 of the *DSU*. These subsidies cause present adverse effects and are prohibited. Amongst those specific subsidies are, *inter alia*:<sup>4</sup>

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<sup>2</sup> See Minutes, DSB Meeting of 23 March 2012, WT/DSB/M/313, para. 79.

<sup>3</sup> Panel Report, United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint), particularly Section VIII.

<sup>4</sup> The NASA and DoD programs listed below should be understood to include all NASA or DoD R&D programs and projects included within the meanings of such terms as used by the EU before the original panel in DS353, regardless of any prior or subsequent changes in titles, budgetary codes, or organizational structure.

## 1. NASA R&D Subsidies

The United States asserted in its 23 September 2012 notification that NASA has: (a) modified the rights accorded to the parties under the contracts covered by the recommendations and rulings of the DSB, as well as subsequent contacts, so as to make them consistent with commercial practice; (b) terminated the Advanced Composites Technology, High Speed Research, Advanced Subsonic Technology, High Performance Computing and Communications, Quiet Aircraft Technology, Vehicle Systems, and Research and Technology Base programs, and reduced funding for aeronautics research contracts with private parties under other aeronautics research programs; (c) changed its policies so as to remove limitations on access to the results of NASA research and development efforts, including by ceasing the use of limited exclusive data rights ("LERD") clauses; and (d) implemented a policy of seeking greater prompt disclosure of the results of its sponsored research when it purchases research and development services from private entities.

The European Union has carefully reviewed these assertions and measures, and considers that NASA maintains subsidies that presently benefit US LCA producers by providing Boeing with funding and access to government facilities, equipment, and employees for R&D applicable to the development, design, and production of LCA on terms more favourable than would be available on the commercial market, as well as by providing Boeing with royalty-free use of the technologies developed with such funding and support or use of such technologies on terms more favourable than would be available on the commercial market through, *inter alia*, the following programs:

- Advanced Composites Technology;
- High Speed Research;
- Advanced Subsonic Technology;
- High Performance Computing and Communications;
- Aviation Safety;
- Quiet Aircraft Technology;
- Vehicle Systems;
- Research and Technology Base;
- Fundamental Aeronautics;
- Integrated Systems Research;
- Aeronautics Strategy and Management;
- Aeronautics Test Program;
- High End Computing; and,
- Strategic Capabilities Assets Program.

The European Union considers that the subsidies include, but are not limited to, those provided through any contracts and other agreements with Boeing (as modified), under these programs, as well as through the contracts and other agreements (as modified) listed in Annex A of the United States' 23 September 2012 notification, and the associated programs.

## 2. Department of Defense R&D Subsidies

The United States asserted in its 23 September 2012 notification that the US DoD has: (a) modified the rights accorded to the parties under the cooperative agreements, technology investment agreements, and Other Transactions covered by the recommendations and rulings of the DSB, as well as subsequent contracts, so as to make them consistent with commercial practice; and (b) ceased funding of the following programs, i.e., Dual Use Application and Dual Use Science and Technology (Program Element ("PE") 0602305F); Navy Manufacturing Technology ("ManTech") (PE 0603771F); Air Force ManTech (PE 0708011F); Defense Advanced Research Projects Agency research on the Joint Strike Fighter (PE 0603800E); Army research related to the Comanche

(PE 0604223A); Air Force research on the B-2 (PE 0604240F); and Air Force research on A-6 Squadrons (PE 0604240F).

The European Union has carefully reviewed these assertions and measures, and considers that the US DoD maintains subsidies that presently benefit US LCA producers by providing Boeing with funding and access to government facilities, equipment, and employees for R&D applicable to the development, design, and production of LCA on terms more favourable than would be available on the commercial market, as well as by providing Boeing with royalty-free use of the technologies developed with such funding and support or use of such technologies on terms more favourable than would be available on the commercial market through, *inter alia*, the following programs:

- A-6 Squadrons;
- Advanced Materials for Weapons Systems;
- Aerospace Avionics/Aerospace Sensors;
- Aerospace Flight Dynamics/Aerospace Vehicle Technologies;
- Aerospace Propulsion;
- Aerospace Propulsion and Power Technology;
- Aerospace Structures/Aerospace Technology Dev/Demo;
- Airborne Warning and Control System (AWACS);
- Aviation Safety Technologies;
- Aviation Survivability;
- AV-8B Aircraft;
- B-2 Advanced Technology Bomber;
- C-17;
- Comanche;
- CV-22;
- Defense Research Sciences;
- Dual Use Applications/Dual Use Science & Technology Program;
- F/A-18 Squadrons;
- F-22;
- Flight Vehicle Technology;
- Flight Vehicle Technology Integration;
- KC-10S;
- KC-46, Next Generation Aerial Refueling Aircraft;
- Joint Strike Fighter;
- Long Range Strike Bomber;
- Manufacturing Technology/Industrial Preparedness Program (Air Force, Navy, Defense Logistics Agency, Defense Wide Manufacturing Science and Technology);
- Materials;
- Materials and Biological Technology;
- Multi-Mission Maritime Aircraft (P-8A);
- RDT&E for Aging Aircraft;
- Sustainment Science & Technology;
- Technology Transfer;
- Technology Transition; and
- V-22.

The European Union considers that the subsidies include, but are not limited to, those provided through any contracts and other agreements with Boeing (as modified), under these

programs, as well as through the agreements and other transactions (as modified) listed in Annex B of the United States' 23 September 2012 notification, and the associated programs.

### **3. Federal Aviation Administration R&D Subsidies**

The US Federal Aviation Administration (FAA), in collaboration with NASA, maintains subsidies that presently benefit US LCA producers by providing Boeing with funding and access to government facilities, equipment, and employees for R&D applicable to the development, design, and production of LCA, as well as by providing Boeing with royalty-free use of the technologies developed with such funding and support, on terms more favourable than would be available in the commercial market through the Continuous Lower Emissions, Energy, and Noise (CLEEN) program and other FAA R&D programs. Such R&D support is authorized by 49 U.S.C. §§ 44501-44517, 48102, and periodic reauthorization legislation.

### **4. Washington State and Local Subsidies**

The United States asserted in its 23 September 2012 notification that the State of Washington is applying rates of B&O tax for aerospace manufacturing and retailing in a manner consistent with Article 5(c) of the *SCM Agreement*.

The European Union has carefully reviewed this assertion, and considers that the State of Washington and its political subdivisions maintain the following subsidies presently benefiting Boeing:

- State B&O tax rate reduction for manufacturers of commercial aircraft;
- State B&O tax credits for preproduction/aerospace product development and property taxes;
- State sales and use tax exemptions for computer hardware, peripherals, and software;
- City of Everett B&O tax reductions;
- State B&O tax credits for leasehold excise taxes on covered buildings and land, pursuant to Section 10 of House Bill 2466 (Chapter 177, Laws of 2006);
- Establishment of a "Dreamlifter Operations Center" at Paine Field by Snohomish County, Washington; and,
- Establishment of the "Joint Center for Aerospace Technology Innovation" to *inter alia* provide aerospace R&D-related funding, coordination, and training.

### **5. FSC/ETI Legislation and Successor Acts**

The United States asserted in its 23 September 2012 notification that the United States has (a) enacted legislation terminating the FSC/ETI tax benefits, and (b) confirmed that Boeing did not use FSC or ETI tax benefits after 2006.

The European Union has carefully reviewed these assertions and measures, and considers that the United States maintains tax exemptions and tax exclusions under FSC/ETI legislation and successor legislation presently benefiting Boeing.

### **6. State of Kansas and City of Wichita Subsidies**

The United States asserted in its 23 September 2012 notification that the City of Wichita (a) is applying its IRB program in a manner consistent with Article 5(c) of the *SCM Agreement*, and (b) has not provided any IRBs to Boeing since 2007.

The European Union has carefully reviewed these assertions and considers that the State of Kansas and the City of Wichita maintain state and local property and sales tax abatements that presently benefit Boeing in relation to the issuance of IRBs by the City of Wichita.

## **7. South Carolina State and Local Subsidies**

The State of South Carolina and its political subdivisions, including the County of Charleston, maintain various subsidies for Boeing related to the production of the company's 787 model of aircraft, primarily (but not exclusively) as part of two incentive packages: (i) the "Project Gemini" incentives, related to the location, establishment, and operation of an additional final assembly line for the 787 at the Charleston International Airport in North Charleston, South Carolina; and, (ii) the "Project Emerald" incentives, related to the location, establishment, and operation of manufacturing facilities for 787 fuselage components on the same site. Such subsidies have served to motivate Boeing to locate a portion of its production and assembly in South Carolina that could have otherwise been located in Washington State and subject to the state and local subsidies in Washington State referenced in item 0, above. These South Carolina state and local subsidies include, but are not limited to, the following:

### **A. Project Gemini**

The measures that constitute the subsidies provided by South Carolina and its political subdivisions for Boeing's 787 final assembly facility include actions by various state agencies and boards, the state legislature, and multiple Charleston County agencies and authorities. Several of South Carolina's commitments to Boeing related to Project Gemini are included in three instruments: (i) the Project Gemini Agreement between Boeing and the State of South Carolina, dated 1 January 2010; (ii) H3130 (Act No. 124 of 2009); and (iii) the Fee Agreement between Charleston County and Boeing, dated 1 December 2009 ("the Boeing Fee Agreement").

Among the subsidies provided to Boeing for the 787 final assembly facility, including through these three instruments along with other instruments, are:

- Provision of a long-term lease of government-owned land at below-market rates;
- Provision of facilities and infrastructure funded through state-issued bonds, at no cost to Boeing;
- Exemptions from state sales and use taxes;
- Reductions of state corporate income tax through income allocation and apportionment agreement and multi-county industrial park designation;
- Property tax exemptions for Boeing's Large Cargo Freighters, pursuant to H3482 (Act No. 45 of 2009);
- Establishment of workforce recruitment, training and development programs for Boeing; and,
- Property tax reductions under a fee-in-lieu-of taxes agreement with Charleston County.

### **B. Project Emerald**

The measures that constitute the subsidies provided by South Carolina and its political subdivisions for Boeing's 787 component manufacturing facilities include actions by various state agencies and boards, the state legislature, and multiple Charleston County agencies and authorities. Several of South Carolina's commitments to Boeing related to Project Emerald are included in two instruments: (i) the Project Emerald Confidential Site Development and Incentive Agreement, undated from 2006; and (ii) the Fee Agreement between Charleston County and Vought Aircraft

Industries, Global Aeronautica, and Boeing, dated 19 December 2006 (the Project Emerald Fee Agreement).

Among the subsidies provided to Boeing for the 787 component manufacturing facilities, including through these two instruments along with other instruments, are:

- Provision of a long-term lease of government-owned land at below-market rates;
- Provision of facilities and infrastructure funded through state-issued bonds, at no cost to Boeing;
- State corporate income tax reductions through a multi-county industrial park designation; and,
- Property tax reductions under a fee-in-lieu-of taxes agreement with Charleston County.

In addition to the measures specifically listed above in Section III of this request for consultations, the European Union also considers that any amendments, supplements, extensions, replacement measures, renewal measures, related measures, or implementing measures may also be subsidies that cause present adverse effects and are prohibited.

#### **IV. LEGAL BASIS**

The United States asserted in its 23 September 2012 notification that, in light of the conditions of competition in the market for large civil aircraft and actions taken by the United States, any adverse effects of the subsidies in question have ceased to exist, or a "genuine and substantial relationship of cause and effect" no longer exists between the subsidies subject to the recommendations and rulings of the DSB and any adverse effects within the meaning of Article 5(c) of the *SCM Agreement*. Through its alleged actions, the United States asserts that it has withdrawn the subsidy or removed the adverse effects with respect to each of the subsidies found to be inconsistent with Article 5(c) of the *SCM Agreement*. The United States asserts that this is the case with regard to all of the Boeing aircraft covered by the DSB recommendations and rulings, as well as the Airbus aircraft with respect to which the adverse effects existed.

The European Union has carefully reviewed these assertions and measures, and considers that, after the end of the implementation period, the United States maintains a series of subsidies, within the meaning of Article 1.1 of the *SCM Agreement*. Those subsidies are specific, within the meaning of Articles 1.2 and 2 of the *SCM Agreement*. Those specific subsidies presently benefit the development, production and sale of Boeing's 737NG, 737 Max, 747, 767, 777 and 787 families of LCA, as well as any other future derivatives of these LCA families, including of the 777. Collectively, and under the conditions of competition present in the LCA markets, those subsidies cause present adverse effects, or threat thereof, to EU interests, inconsistently with Articles 5(c), 6.3(a), 6.3(b) and 6.3(c), including Articles 6.4 and 6.5, of the *SCM Agreement*. The effects of those subsidies adversely impact sales, market shares and prices of Airbus' A320, A320neo, A330, A350XWB and A380 families of LCA. Specifically, the subsidies cause present serious prejudice, or threat thereof, to EU interests, in the form of: (i) displacement and impedance of EU imports into the United States, within the meaning of Article 6.3(a) of the *SCM Agreement*; (ii) displacement and impedance of EU exports to other third country markets, within the meaning of Article 6.3(b) of the *SCM Agreement* (including on the basis of Article 6.4 of the *SCM Agreement*); and, (iii) significant price undercutting, price suppression, price depression, and lost sales, within the meaning of Article 6.3(c) of the *SCM Agreement* (including on the basis of Article 6.5 of the *SCM Agreement*).

The subsidies are also contingent on export performance, as well as on the use of domestic over imported goods, such that they are, accordingly, inconsistent with Articles 3.1(a), 3.1(b) and 3.2

of the *SCM Agreement*. Finally, through the measures identified in this request, the United States accords treatment less favourable than that accorded to like products of US origin, inconsistently with Articles III:4 and III:5 of the *GATT 1994*.

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An Annex to this request includes, pursuant to Articles 4.2 and 7.2 of the *SCM Agreement*, a statement of available evidence as to the existence and nature of these subsidies and the serious prejudice they cause EU interests.

In accordance with paragraph 1 of the Sequencing Agreement, the European Union looks forward to holding these consultations within fifteen days of the receipt of this request by the United States.

To the extent the Parties are unable to resolve this dispute pursuant to consultations and the European Union consequently files a request for panel establishment, the European Union reserves the right to request at that time that the DSB initiate the procedures for developing information concerning serious prejudice under Annex V of the *SCM Agreement*. At that time, the DSB "shall" initiate those procedures, as clarified by the Appellate Body Report in *US – Large Civil Aircraft*.<sup>5</sup>

This request for consultations is without prejudice to the European Union's right to proceed directly to a request for DSB authorization to apply countermeasures, under footnote 1 and paragraph 6 of the Sequencing Agreement.

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<sup>5</sup> Appellate Body Report, *US – Large Civil Aircraft*, paras. 531-533, 549.

## ANNEX

### STATEMENT OF AVAILABLE EVIDENCE

For purposes of Articles 4.2 and 7.2 of the *SCM Agreement*, the European Union sets out below evidence available to it at this time regarding the existence and nature of the specific subsidies subject to this request for consultations, as well as regarding the serious prejudice caused to EU interests by the subsidies. The European Union reserves the right to supplement or alter this list in the future, as required.

- Panel Report, *US – Large Civil Aircraft*, WT/DS353/R, 31 March 2011, adopted as modified by the Appellate Body Report, 23 March 2012;
- Appellate Body Report, *US – Large Civil Aircraft*, WT/DS353/AB/R, 12 March 2012, adopted 23 March 2012;
- *US – Large Civil Aircraft*, Exhibits EC-1 through EC-1450;
- *US – Large Civil Aircraft*, Exhibits US-1 through US-1364;
- NASA Budget Submissions, Fiscal Years 2007 through 2013;
- NASA Research Opportunities in Aeronautics Solicitations for 2007 through 2011;
- NASA Contract and Award Data from the Federal Procurement Data System – Next Generation (FPDS-NG) and USAspending.gov;
- All valid U.S. patents issued/assigned to Boeing, that were funded in-part or in-whole by NASA, according to the USPTO Patent Full-Text and Image Database (PatFT) (<http://www.uspto.gov/patents/process/search/>);
- DoD Research, Development, Test & Evaluation Budget Submissions, Fiscal Years 2007 through 2013;
- DoD Contract and Award Data from the Federal Procurement Data System – Next Generation (FPDS-NG) and USAspending.gov;
- All valid U.S. patents issued/ assigned to Boeing, that were funded in-part or in-whole by the DoD, according to the USPTO Patent Full-Text and Image Database (PatFT) (<http://www.uspto.gov/patents/process/search/>);
- FAA Other Transaction Agreement No. DTFAWA-10-C-00030;
- FAA Solicitation No. DTFAWA-09-R-03293;
- FAA, Fact Sheet - Continuous Lower Energy, Emissions and Noise (CLEEN) Program (24 June 2010);
- Boeing, Continuous Lower Energy, Emissions and Noise (CLEEN) Technologies Development – Boeing Program Update (2 November 2011);
- Boeing, Boeing Unveils Plans for Advanced ecoDemonstrator Program (21 July 2010);
- Qualification for FSC benefits and ETI Exclusions," Office of Chief Counsel, Internal Revenue Service Memorandum Number AM 2007-001, 22 December 2006;
- Substitute Senate Bill 6828 (Chapter 81, Laws of 2008) (Washington), enacted 20 March 2008;
- House Bill 2466 (Chapter 177, Laws of 2006) (Washington), enacted 23 March 2006;
- Substitute Senate Bill 5982 (Chapter 242, Laws of 2012) (Washington), enacted 30 March 2012;
- Revised Code of Washington 28B.155.010, 82.04.260(11), 82.04.4461, 82.04.4463, 82.08.975, and 82.12.975, as amended;
- Washington State Department of Revenue, 2012 Tax Exemption Study (January 2012);
- Snohomish County Council Motion 12-062, "Authorizing the Snohomish County Executive to Sign a Predevelopment Contract to Design a Dreamlifter Operations Center and Exclusive

Option to Lease Land at the Snohomish County Airport" and attachments thereto, passed 13 February 2012;

- City of Wichita, Chart, IRBs Issued to Boeing, 1979-2007;
  - Industrial Revenue Bond Lease Agreements between Boeing and the City of Wichita for 2006 and 2007;
  - H3130 (Act No. 124 of 2009) (South Carolina), enacted 30 November 2009;
  - H3482 (Act No. 45 of 2009) (South Carolina), enacted 2 June 2009;
  - Project Gemini Agreement between the Boeing Company and the State of South Carolina, dated 1 January 2010;
  - Fee Agreement between Charleston County and Boeing, dated 1 December 2009;
  - Project Emerald Confidential Site Development and Incentive Agreement;
  - Fee Agreement between Charleston County and Vought Aircraft Industries, Global Aeronautica, and the Boeing Company, dated 19 December 2006;
  - Ground Lease Agreement between Charleston County Airport Authority and South Carolina Public Railways, dated 25 August 2006;
  - Information regarding Airbus and Boeing products, including at <http://www.airbus.com/aircraftfamilies/> and <http://www.boeing.com/commercial/products.html>, and related links and company information;
  - Airbus and Boeing documents describing aircraft performance and seating capacity;
  - Boeing list prices, as well as order and delivery data, including at <http://www.boeing.com/commercial/prices/> and <http://active.boeing.com/commercial/orders/index.cfm>;
  - Airbus order and delivery data, including at [http://www.airbus.com/no\\_cache/company/market/orders-deliveries/](http://www.airbus.com/no_cache/company/market/orders-deliveries/) (and based on internal confidential sources);
  - Airbus marketing material analysing the competitive relationship between various Airbus and Boeing products;
  - Ascend database;
  - Boeing Current Market Outlook, various editions (including at <http://www.boeing.com/commercial/cmo/>);
  - Airbus Global Market Forecast, various editions (including at <http://www.airbus.com/company/market/forecast/> and <http://www.airbus.com/presscentre/corporate-information/key-documents/>);
  - Airbus press releases (including at <http://www.airbus.com/newsevents/all-news/press-releases/>);
  - Boeing press releases (including at <http://boeing.mediaroom.com/> and <http://www.boeing.com/news/releases/archive.html>);
  - Press releases by Airbus and Boeing customers;
  - Notification of the Withdrawal of Subsidies and Removal of Adverse Effects in *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)* (23 September 2012) and the documents referenced therein.
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